(1)

88-1848

No.

Supreme Court of the United States

October Term, 1983

BERNARD P. ELKIN and BOSTON PNEUMATICS, INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD A. KERNER
Attorney for Petitioners
30 Vesey Street
New York, NY 10007
(212) 964-1098

RICHARD A. KERNER
WALTER J. KENNEY
Of Counsel

4782

Questions Presented.

1. Did the court of appeals err in holding that materiality is not an element of the crimes of making a false statement and filing a false claim, pursuant to 18 U.S.C. §§ 1001 and 287, respectively?

2. Did the court of appeals err in placing Boston Pneumatics, Inc., on probation since 18 U.S.C. § 3651 does not specifically authorize and was not intended to impose terms of probation upon corporate defendants?

3. May a mailing, solicited by the government, more than two years after the fruition of a fraudulent scheme, support a conviction under 18 U.S.C. § 1341?

4. May the prosecution use a former attorney of petitioners to assist it both before and during trial, particularly where a prior judicial ruling was neither sought nor obtained?

5. May a sleeping juror participate in jury deliberations?

6. Did the cumulative conduct of both the court and the prosecutor at the trial herein so far depart from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervisory powers?

Table of Contents.

	Page
Questions Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	6
Reasons for Granting the Writ	9
1. Materiality	9
2. Corporate probation	14
3. The mailing	15
4. Unethical use of prior counsel	17
5. Sleeping juror	18
6. Improperly prejudicial cumulative conduct at trial	19
IN CONCLUSION, the petition for a writ of certiorari should be granted	20
Appendix	1a

TABLE OF AUTHORITIES.

Page

CASES:

Alexander v. United States, 138 U.S. 353 (1981) 17

Ex Parte United States, 242 U.S. 27 (1916) 14

Fisher v. United States, 425 U.S. 391 (1976) 17

Gonzales v. United States, 286 F.2d 118 (10th Cir. 1960), *cert. denied,* 365 U.S. 878 (1961) 10

Johnson v. United States, 410 F.2d 38 (8th Cir. 1969), *cert. denied,* 396 U.S. 812 (1969) 12

McNabb v. United States, 318 U.S. 332 (1943) 18

Nardone v. United States, 308 U.S. 338 (1939) 18

United States v. Aadal, 368 F.2d 962 (2nd Cir. 1966), *cert. denied,* 386 U.S. 970 (1967) 9

United States v. Adler, 623 F.2d 1287 (8th Cir. 1980) 10, 12, 13

United States v. Atlantic Richfield Co., 465 F.2d 58 (7th Cir. 1972) 15

United States v. Beer, 518 F.2d 168 (5th Cir. 1978). 12, 13

United States v. Danilow Pastry Co., Inc., 563 F. Supp. 1159 (S.D.N.Y. 1983) 14, 15

Page

United States v. Deep, 497 F.2d 1316 (9th Cir. 1974) 10, 12

United States v. East, 416 F.2d 351 (9th Cir. 1969) . 10, 12

United States v. J.C. Ehrlich Co., 372 F. Supp. 768 (D. Md. 1974) 15

United States v. Gilbertson, 588 F.2d 584 (8th Cir. 1978) 10

United States v. Guthartz, 573 F.2d 225, *reh'g denied,* 576 F.2d 931 (5th Cir. 1978), *cert. denied,* 439 U.S. 864 (1979) 11

United States v. Haynie, 568 F.2d 1091 (5th Cir. 1978) 11, 12, 13

United States v. Hicks, 619 F.2d 752 (8th Cir. 1980) 10, 13

United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982) 10, 11, 12

United States v. Jamil, 546 F. Supp. 646 (E.D.N.Y. 1982) 18

United States v. Johnson, 530 F.2d 52 (5th Cir. 1976), *cert. denied,* 429 U.S. 833 (1976) 11

United States v. Jones, 464 F.2d 1118 (8th Cir. 1972), *cert. denied,* 409 U.S. 1111 (1972) ... 10, 13

United States v. Krause, 507 F.2d 113 (5th Cir. 1975) 11

Page

United States v. Lichenstein, 610 F.2d 1272 (5th Cir. 1980), *cert. denied, sub nom.* Bella v. United States, 447 U.S. 907 (1980) 11

United States v. McGough, 510 F.2d 598 (5th Cir. 1975) 11

United States v. Maze, 414 U.S. 395 (1974) 16

United States v. Mitsubishi Int'l. Corp., 677 F.2d 785 (9th Cir. 1982) 14, 15

United States v. Panebianco, 543 F.2d 447 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977) 18

United States v. Radetsky, 535 F.2d 556 (10th Cir. 1976), *cert. denied,* 429 U.S. 820 (1976) 10, 12

United States v. Rinaldi, 373 F.2d 97 (2d Cir. 1968), *cert. denied,* 393 U.S. 913 (1968) 9

United States v. Silva, 715 F.2d 43 (2d Cir. 1983) ... 10

United States v. Snider, 502 F.2d 645 (4th Cir. 1974) 11, 12

United States v. Talkington, 589 F.2d 415 (9th Cir. 1978) 10, 12

United States v. Valdez, 594 F.2d 725 (9th Cir. 1979) 10, 12

United States v. Voorhees, 593 F.2d 346 (8th Cir. 1979), *cert. denied,* 411 U.S. 936 (1979) 10, 13

Page

United States v. Weiss, 431 F.2d 1402 (10th Cir. 1970) 10, 12

United States v. Wright Contracting Co., 563 F. Supp. 213 (D. Md. 1983) 14

United States v. Zambito, 315 F.2d 266 (4th Cir. 1963), *cert. denied,* 373 U.S. 924 (1963) 11

CONSTITUTIONAL PROVISIONS AND STATUTES:

United States Const. amend. VI 2, 19

18 U.S.C. § 287 2

18 U.S.C. § 1001 3

18 U.S.C. § 1341 3

18 U.S.C. § 3651 4

MISCELLANEOUS:

88 A.L.R. 2d 1278 18

Chaffee, *No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into Corporate Punishment,* 79 Mich.L.Rev. 386 (1981) 15

Code of Professional Responsibility, Canon 4, EC4-1, DR 4-101(B) (1970) 5, 18

8 Wigmore, Evidence, § 2292 *et seq.* (McNaughton Rev. 1961) 17

NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

BERNARD P. ELKIN and BOSTON PNEUMATICS, INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Bernard P. Elkin and Boston Pneumatics, Inc., through their counsel, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit rendered in this case on March 15. 1984.

Opinion Below.

The opinion of the court of appeals is reported at F.2d Appendix, *infra,* 1a-19a). The petitioners were convicted

on April 13, 1983 after a jury trial before the Hon. Henry Bramwell in the Eastern District of New York as follows: Bernard P. Elkin was found guilty of violating 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 287 (false claim); 18 U.S.C. § 1503 (obstruction of justice).

Jurisdiction.

The judgment of the court of appeals was entered on March 15, 1984. On April 3, 1984, the government was granted a 30-day extension within which to petition for a rehearing or a rehearing *en banc*. On April 5, 1984, the government withdrew its motion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved.

1. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. 18 U.S.C. § 287 provides:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or

to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. 18 U.S.C. § 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

4. 18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail, according to the direction thereon, or at the place at

which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

5. 18 U.S.C. § 3651 provides, in relevant part:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best . . . .

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any person, for whose support he is legally responsible.

5. Code of Professional Responsibility Canon 4 (1970) provides:

A Lawyer Should Preserve the Confidences and Secrets of a Client.

6. Code of Professional Responsibility EC 4-1 (1970) provides:

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

7. Code of Professional Responsibility DR 4-101(B) (1970) provides:

Except when permitted under DR 4-101(C)[not herein applicable], a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Statement.

On August 7, 1978, Boston Pneumatics, Inc. (hereinafter "BPI"), was awarded a government contract to supply a quantity of ½ inch valves to the Department of Defense. On February 3, 1983, both BPI and its president, Bernard P. Elkin, were indicted and charged, *inter alia,* with (a) mail fraud (18 U.S.C. § 1341), (b) making a false claim for reimbursement (18 U.S.C. § 287), and (c) making false statements (18 U.S.C. § 1001). Both petitioners were convicted on all three counts. In addition, Bernard P. Elkin was convicted of obstructing justice (18 U.S.C. § 1503).

A crucial witness testifying for the government was an attorney, Samuel Saggett, who formerly represented both of the petitioners. The prosecution had several interviews with Saggett prior to the commencement of the trial. Neither Saggett nor the prosecution notified petitioners of these conferences.

During the course of the trial it became apparent that Saggett was a *sub rosa* member of the prosecution team. A motion for a mistrial was duly made by the defendants. The court denied the said application with the following remark: "He can do anything he wants. What he wants to do is up to him". Significantly, at no time, either prior to, during, or after the trial, did the government seek judicial approval for its interviews or use of Saggett.

The attention of this Honorable Court is also respectfully called to the fact during a majority of the trial, juror No. 5 was asleep and snoring heavily in the courtroom. This juror was then permitted to partake in deliberations despite an unopposed objection thereto. Against this setting, the trial took on a farcical atmosphere by permitting a verdict to be rendered by less than a competent twelve member jury, and by eliciting testimony against a chorus of deep slumbrous breathing.

Moreover, the record of the trial is replete with unfairly prejudicial interruptions and comments by the trial judge, in front of the jury, by (a) rehabilitating government witnesses, (b) impairing cross examination of defense counsel, (c) restricting the defendants' case, and (d) castigating the attorneys for the defendants.

Additionally, the prosecutor engaged in clearly impermissible conduct by indicating to the jury that the individual defendant could testify if he so desired, thus placing the defendant in a position of being penalized for exercising his constitutional right against self-incrimination.

The government's attorney further sought to intimidate and frighten various defense witnesses by making a late night visit at one witness' home on the eve of his

testimony, and by accosting and detaining another witness, newly arrived from Italy, as he deplaned at Kennedy International Airport, all of which was accomplished under the imprimatur of the official authority of the United States government.

The first count of the indictment charges the crime of mail fraud (18 U.S.C. § 1341). The undisputed evidence showed that the mailing occurred more than two years after the alleged fraud came to fruition. Moreover, the subject mailing was solicited by counsel for the government in a companion civil action involving the identical contract which underlies the instant indictment. On both grounds, the defense moved to dismiss Count I of the indictment.

As to Counts II and III, an essential element of the crimes charged is that of materiality. Count II relates to the false statement statute (18 U.S.C. § 1001) and Count III pertains to the making of a false claim to the government (18 U.S.C. § 287). Signficantly, as to both counts, the district court charged the jury, *as a matter of law,* that the subject statement and claim were material, thereby leaving the triers of the facts no questions to resolve on these issues.

Finally, it is respectfully called to the attention of this Honorable Court that following the conviction, as to petitioner, Boston Pneumatics, Inc., a publicly held corporation, the district court suspended sentence and ordered restitution. Thereafter, the Court of Appeals for the Second Circuit vacated the sentence insofar as the suspension of sentence, modified the restitutionary terms, and ruled that the corporate petitioner be placed on probation.

Clearly, the lower court failed to consider the impact of a probationary term upon Boston Pneumatics, Inc., and upon its numerous stockholders, employees, creditors and suppliers.

Reasons for Granting the Writ.

1. Materiality:

The court of appeals, treating this matter as a case of first impression within the circuit, ruled that materiality is not required to be proved for a false claim violation, under 18 U.S.C. § 287. Similarly, it also held that materiality is not an element of the offense of making a false statement, pursuant to 18 U.S.C. § 1001. Lastly, it decided that even if materiality was an element of the crimes charged, it would be a question of law to be decided by the court and not the jury.

The circuits, having no guidance from this Court, are now in conflict on three levels: (a) as to the requirement of materiality as an element of an offense under 18 U.S.C. § 1001; (b) as to the requirement of materiality as an element of the offense uner 18 U.S.C. § 287; (c) as to whether the issue of materiality is a question of law or of fact, when it is deemed an element of the specified crimes.

(a) Materiality as an element under 18 U.S.C. § 1001.

The Court of Appeals for the Second Circuit in this case held that "materiality is not an element of the offense of making a false statement in violation of § 1001" (8a). In so ruling it relied on *United States v. Rinaldi,* 393 F.2d 97, 99-100 (2d Cir. 1968), *cert. denied,* 393 U.S. 913 (1968); *United States v. Aadal,* 368 F.2d 962, 964 (2d Cir. 1966),

cert. denied, 386 U.S. 970 (1967); *see, United States v. Silva,* 715 F.2d 43, 49-50 (2d Cir. 1983).

In contrast and in conflict with this decision the Court of Appeals for the Tenth Circuit has held consistently that materiality *is* an essential element to support a violation under 18 U.S.C. § 1001. *United States v. Irwin,* 654 F.2d 671, 677 n. 8 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982); *United States v. Radetsky,* 535 F.2d 556 (10th Cir. 1976), *cert. denied,* 429 U.S. 820 (1976); *United States v. Weiss,* 431 F.2d 1402 (10th Cir. 1970); *Gonzales v. United States,* 286 F.2d 118 (10th Cir. 1960), *cert. denied,* 365 U.S. 878 (1961).

Similarly, the Court of Appeals for the Ninth Circuit is in accord with the Tenth Circuit. Their decisions hold that materiality is an essential element to be proved in order to support a violation of the false statement statute, under 18 U.S.C. § 1001. *Unites States v. East,* 416 F.2d 351 (9th Cir. 1969); *United States v. Valdez,* 594 F.2d 725 (9th Cir. 1979); *United States v. Talkington,* 589 F.2d 415 (9th Cir. 1978); *United States v. Deep,* 497 F.2d 1316 (9th Cir. 1974).

Moreover, the Court of Appeals for the Eighth Circuit also agrees that the issue of materiality is an essential element to the proof of the false statement charge pursuant to 18 U.S.C. § 1001. *United States v. Jones,* 464 F.2d 1118 (8th Cir. 1972); *Unites States v. Adler,* 623 F.2d 1287 (8th Cir. 1980); *United States v. Voorhees,* 593 F.2d 346 (8th Cir. 1979), *cert. denied,* 411 U.S. 936 (1979); *United States v. Gilberson,* 588 F.2d 584 (8th Cir. 1978); *United States v. Hicks,* 619 F.2d 752 (8th Cir. 1980).

The Fifth Circuit also has held that materiality is a requisite element to be determined before a defendant may

be convicted under 18 U.S.C. § 1001, of making a false statement to the government. *United States v. Guthartz,* 573 F.2d 225 (5th Cir. 1978), *reh'g denied,* 576 F.2d 931, *cert. denied,* 439 U.S. 864 (1979); *United States v. Johnson,* 530 F.2d 52 (5th Cir. 1976), *cert. denied,* 429 U.S. 833 (1976); *United States v. Krause,* 507 F.2d 113 (5th Cir. 1975); *United States v. Litchenstein,* 610 F.2d 1272 (5th Cir. 1980), *cert. denied, sub nom. Bella v. United States,* 447 U.S. 907 (1980); *United States v. McGough,* 510 F.2d 598 (5th Cir. 1975); *United States v. Haynie,* 568 F.2d 1091 (5th Cir. 1978).

The Court of Appeals for the Fourth Circuit is also aligned with the majority of the circuit courts on this question in holding that materiality is an essential element under § 1001. *United States v. Snider,* 502 F.2d 645 (4th Cir. 1974); *United States v. Zambito,* 315 F.2d 266 (4th Cir. 1963), *cert. denied,* 393 U.S. (1963).

It is obvious that the second circuit's view represents the dissenter to the vast majority of courts which have considered the question. The conflict however does not stop there.

(b) Materiality under 18 U.S.C. § 287.

In the instant case, the Second Circuit further ruled, as a case of first impression, that the crime of filing a false claim, pursuant to 18 U.S.C. § 287, similarly does not require proof of materiality as an element of the offense (9a). In so holding, it relied on *United States v. Irwin,* 654 F.2d 671, 682 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982).*

*This reliance is somewhat peculiar since *Irwin* also held that proof of materiality *was* required under 18 U.S.C. § 1001. *Id.*, 654 F. 2d at pp. 675-76.

Here again, the ruling in the instant case is in conflict with the Courts of Appeals for the Eighth, Fifth and Fourth Circuits. *United States v. Adler,* 623 F.2d 1287 (8th Cir. 1980); *Johnson v. United States,* 410 F.2d 38 (8th Cir. 1969), *cert. denied,* 396 U.S. 822 (1969); *United States v. Haynie,* 568 F.2d 1091 (5th Cir. 1978); *United States v. Snider,* 502 F.2d 645 (4th Cir. 1974).

(c) Materiality as a question of law or fact.

The Second Circuit, in the opinion below, held that *if* materiality was a requirement, either under 18 U.S.C. §§ 1001 or 287, it would be a question of law to be decided by the trial judge (9a-10a). In reaching this conclusion, the court followed *United States v. Haynie,* 568 F.2d 1091, 1092 (5th Cir. 1978) [applying 18 U.S.C. § 287], and *United States v. Beer,* 518 F.2d 168, 170-71 (5th Cir. 1975) [applying 18 U.S.C. § 1001].

Significantly, the Tenth Circuit has consistently held that the element of materiality herein is a question of fact to be submitted to the jury. *United States v. Irwin, supra,* 654 F.2d 671 (10th Cir. 1981), *cert. denied,* 455 U.S. 1016 (1982); *United States v. Radetsky,* 435 F.2d 556 (10th Cir. 1976), *cert. denied,* 429 U.S. 820 (1976); *United States v. Weiss,* 431 F.2d 1402 (10th Cir. 1970).

The Ninth Circuit is in accord with the Tenth Circuit in holding that materiality is a question of fact for the jury. *United States v. East,* 416 F.2d 351 (9th Cir. 1969); *United States v. Valdez,* 594 F.2d 725 (9th Cir. 1979); *United States v. Talkington,* 589 F.2d 415 (9th Cir. 1978); *United States v. Deep,* 497 F.2d 1316 (9th Cir. 1974).

Notably, the Eighth Circuit is in conflict, internally, holding both ways. Thus, in *United States v. Voorhees,* 593 F.2d 346 (8th Cir. 1979), *cert. denied,* 411 U.S. 936 (1979), the court ruled that materiality was a question of fact for the jury. Other cases in that circuit here indicated that materiality presented an issue of law for the tribunal. *United States v. Adler,* 623 F.2d 1287 (8th Cir. 1980); *United States v. Hicks,* 619 F.2d 752 (8th Cir. 1980); *United States v. Jones,* 464 F.2d 1118 (8th Cir. 1972).

The Court of Appeals for the Fifth Circuit, relied upon in the opinion in the instant case, has uniformly held that materiality is a question of law for the courts to decide. *See, e.g. United States v. Haynie, supra,* and *United States v. Beer, supra.*

Significantly, in all of the cases hereinabove referred to, certiorari was either denied or not sought. Each of those cases involved either of the subject statutes, i.e., false claim (18 U.S.C. §287), or false statements (18 U.S.C. § 1001). This case involves *both* statutes, in addition to which is the issue of whether it is for the court or for the jury to decide whether the alleged false statement and/or claim was material. Thus, the instant case allows the Court to finally decide these issues, involving all of the areas of conflict among the circuit courts of appeals. It further affords the opportunity to clarify vexing and significant issues involved in the administration of the federal criminal code under statutes (18 U.S.C. §§ 287 and 1001) which are in common and frequent use throughout the nation. Petitioners urge this Court to grant this petition for those reasons.

2. Corporate probation:

The Court of Appeals for the Second Circuit, in this case, vacated the suspended sentence of BPI and instructed the district court to resentence the petitioner in conformity with its decision, to wit, a modification of restitution and imposition of a sentence of probation for the corporation.

Signficantly, the statute relied upon, 18 U.S.C. § 3651, is devoid of any reference to corporate defendants. Indeed, the language of the statute plainly indicates that it was intended to apply to individual defendants. Moreover, a rational probationary scheme is inconsonant with the management and oversight of complex corporate and financial affairs by the United States Department of Probation. Plainly, probationary officials are neither equipped nor trained to operate and manage an active business corporation. *A fortiori,* the petitioner, Boston Pneumatics, Inc., a publicly-held corporation with numerous stockholders, employees, creditors, suppliers and customers, does not lend itself to a sentence of probation.

The legislative authority for imposing a term of probation is derived from 18 U.S.C. § 3651. This statute was enacted so as to empower the court to impose probation over individuals. *See, Ex Parte United States,* 242 U.S. 27 (1916). Thus, the extension of that power to embrace corporate defendants is inaccurate, inappropriate and improper. *See, e.g., United States v. Mitsubishi Int'l. Corp.,* 677 F.2d 785 (9th Cir. 1982); *United States v. Danilow Pastry Co., Inc.,* 563 F. Supp. 1159 (S.D.N.Y. 1983); *United States v. Wright Contracting Co.,* 563 F. Supp. 213 (D.Md. 1983).

Notably, in *Mitsubishi* and *Danilow Pastry*, both courts expressed concern over the lack of clarity and guidelines provided by the statute (18 U.S.C. § 3651), warranting them to indulge euphemistically, in "unique and creative" sentencing. *United States v. Mitsubishi Int'l. Corp., supra,* 677 F.2d at p. 788; *United States v. Danilow Pastry Co., Inc., supra,* 563 F. Supp. at p. 1166; *Cf.* Chaffee, *No Soul to Damn, No Body to Kick: An Unscandalized Inquiry Into the Problem of Corporate Punishment,* 79 Mich. L.Rev. 386, 448-57 (1981).

Similar reservations were expressed by other courts. *United States v. Atlantic Richfield Co.,* 465 F.2d 58 (7th Cir. 1972); *United States v. J.C. Ehrlich Co.,* 372 F. Supp. 768, 769 (D.Md. 1974).

This gloss placed upon 18 U.S.C. § 3651 is both historically, legislatively and practically unwarranted. It is respectfully submitted that a policy of corporate probation will result in profound effects upon society as well as upon the judicial system, all of which have never been considered by this Court. It is for these reasons and the importance of this issue that we urge this Court to grant this petition.

3. The mailing:

The indictment alleges that the petitioners filed a false claim for payment from the government, on June 27, 1979. Payment was made on August 3, 1979. Importantly, neither the request nor the payment involved the use of the mails.

Thereafter, in a subsequent civil litigation over this very contract, in December 1981, the government, through its counsel, requested documentation supporting the said

claim. A letter from petitioners' accountant, was thereupon mailed by the then-attorney for petitioners to government counsel. It is this letter that forms the basis of the subject mail fraud charge. Plainly, the fraud, if any, actually occurred on June 27, 1979, when the request for payment was made. More importantly, the scheme reached fruition on or about August 3, 1979, when payment was received. Thus, the scheme, the only one charged in the indictment, was completed in August of 1979, two years before the mailing in question. The mailing, clearly, was not sufficiently related to the scheme to bring defendants' conduct within the prohibition of the mail fraud statute (18 U.S.C. § 1341).

This Court, in *United States v. Maze*, 414 U.S. 395, 401 (1974), clearly outlined the parameters of 18 U.S.C. § 1341:

> "Under the statute, the mailing must be 'for the purpose of executing the scheme, as the statute requires' (citing *Kann v. United States*, 323 U.S. 88, 94 [1944]) . . . It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.
>
> "[T]here was not a sufficient connection between the mailing and the execution of the defendants' scheme, because it was immaterial to the defendants how the oil company went about collecting its payment."

Accordingly, the petitioners' conviction of mail fraud is in patent conflict with this court's holding in *Maze*. It therefore follows that a similar result should ensue in the case at bar where the mailing in question occurred some two and one-half years subsequent to the time of the operative events involved in the indictment.

4. Unethical use of prior counsel:

In the case at bar, petitioners were represented by an attorney, Samuel Saggett, for a number of years prior to the commencement of these proceedings. On more than one occasion, prior to trial, Saggett met with prosecution officials, without any notification having been given to the petitioners or to the district court. During the course of the trial, Saggett assisted the prosecution in its case and testified. When objections were interposed to the use of such privileged and confidential information, the trial judge denied these challenges, stating, "He [the Assistant United States Attorney] can do anything he wants. I have no control over him. What he wants to do is up to him."

Significantly, this privilege may only be waived by the client and not the attorney. *See: Alexander v. United States,* 138 U.S. 353 (1891); 8 *Wigmore, Evidence,* §§ 2292 *et seq.* (McNaughton Rev. 1961). As this court held in *Fisher v. United States,* 425 U.S. 391, 402 (1976):

> "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys . . . As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."

On appeal, this ruling was fully briefed and argued, despite the fact that the opinion of the court below ignored, *in toto,* this issue (1a, *et seq.*).

Petitioners asked the district court to declare a mistrial; it remained mute. Thereafter, protection of petitioners' confident communications was sought from the court of appeals, and it too failed to address this flagrant breach of minimal legal conduct. See, Code of Professional Responsibility Canon 4, EC 4-1, DR 4-101(B) (1970).

It has long been established that government prosecutors are bound by the Code of Professional Responsibility. *See, e.g., United States v. Jamil,* 546 F.Supp. 646 (E.D.N.Y. 1982). Petitioners now ask this Court to grant this petition under the exercise of its supervisory powers. *See, McNabb v. United States,* 318 U.S. 332 (1943); *Nardone v. United States,* 308 U.S. 338 (1939).

5. Sleeping juror:

During the course of the trial, one juror was asleep about eighty percent of the time. This was brought to the court's attention, as well as the fact that his snoring was distracting. The court was asked to excuse the juror. The juror was questioned by the trial judge and readily admitted he dozed a couple of times. The government did not object to the sleeping juror's removal, but the court, nevertheless, denied the motion to excuse the juror.

Ordinarly, the trial judge has broad discretion in dealing with jury misconduct. *United States v. Panebianco,* 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977); *see:* 88 A.L.R.2d 1278 at 1281.

Here, it was not denied that the subject juror was sleeping and snoring during most of the time of this trial. Indeed, the government did not object to the motion to excuse the said juror. Under these circumstances, it is

beyond cavil that retention of the said juror by the trial judge constituted an abuse of discretion on his part and a deprivation of the right to a trial by jury on the part of the defendants. U.S. Const. Amend. VI.

Accordingly, petitioners urge the granting of this petition on the instant ground that the deprivation of defendants' fundamental right to a jury trial herein so far departs from minimal standards of justice so as to invoke this Court's supervisory powers.

6. Improperly prejudicial cumulative conduct at trial:

In addition to a sleeping, snoring juror and the gross departure from ethical standards by the prosecution in utilizing privileged communications, other improper incidents during the course of the trial abound, including: (a) defendant's wife was called by the government as a witness concerning marital conferences pertaining to acts not charged in the indictment, (b) the prosecution accosted and attempted to intimidate several witnesses of the defense, (c) during the trial and in summation, the prosecutor improperly commented on the defendant's silence, (d) the trial judge repeatedly interrupted defense counsel, rehabilitated government witnesses and disparaged the defense before the jury.

All of the foregoing rendered it impossible for the defendants to receive any semblance of a fair trial herein.

Similarly, the court of appeals completely ignored these issues which were fully briefed by petitioners.

It is respectfully submitted that both courts below so far departed from accepted standards as to require this court's exercise of its supervisory powers.

IN CONCLUSION,

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. KERNER
Attorney for Petitioners

RICHARD A. KERNER
WALTER J. KENNEY
Of Counsel

May 8th, 1984.

APPENDIX.

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 525, 526—August Term, 1983

(Argued: December 12, 1983 Decided: March 15, 1984)

Docket Nos. 83-1243, -1244

UNITED STATES OF AMERICA,

Appellee,

—v.—

BERNARD P. ELKIN, a/k/a "Bob Elkin," and BOSTON PNEUMATICS, INC.,

Defendants-Appellants.

Before:

MESKILL, KEARSE, and CARDAMONE,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Henry Bramwell, *Judge*, convicting defendants of mail fraud, submitting false statements, submit-

ting a false claim, and obstruction of justice, in violation of 18 U.S.C. §§ 1341, 1001, 287, & 1503 (1982).

Convictions affirmed; sentences vacated and remanded.

PETER CHAVKIN, Assistant United States Attorney, Brooklyn, New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, L. Kevin Sheridan, Assistant United States Attorney, Brooklyn, New York, on the brief), *for Appellee.*

RICHARD A. KERNER, New York, New York, *for Defendant-Appellant Elkin.*

WALTER J. KENNEY, New York, New York, *for Defendant-Appellant Boston Pneumatics, Inc.*

KEARSE, *Circuit Judge*:

Defendants Bernard P. Elkin and Boston Pneumatics, Inc. ("BPI"), appeal from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Henry Bramwell, *Judge*, convicting them of submitting a false claim for reimbursement to the United States Department of Defense on a government contract ("Contract"), in violation of 18 U.S.C. § 287 (1982); submitting false statements in connection with

that claim, in violation of *id.* § 1001; and mail fraud, in violation of *id.* § 1341. Elkin also appeals from his conviction of obstruction of justice, in violation of *id.* § 1503, for having impeded the grand jury's investigation of the false claim. The court sentenced Elkin to probation for five years and ordered as a special condition of probation that he make restitution to the government in the amount of $119,534, and restitution to two subcontractors in the amounts of $69,785 and $29,840, respectively. The court also ordered BPI to make such restitution. On appeal, defendants challenge the validity of their convictions principally on the grounds that there was no evidence of a mailing sufficient to sustain the mail fraud count and that the court improperly failed to submit to the jury the question whether the falsities in defendants' false claim and false statements were material. Defendants also contend that the court had no authority to order them to make restitution to the subcontractors, or to make restitution to the government in an amount in excess of $65,142, the amount of the fraudulently procured payment charged in the indictment. For the reasons below, we affirm the convictions, but vacate the judgments and remand for resentencing.

I. BACKGROUND

A. *The Events*

The evidence presented at trial, viewed in the light most favorable to the government, revealed the following events. In August 1978, the United States Department of Defense awarded BPI a fixed-price contract for the production of globe stop valves. Elkin, BPI's president and principal shareholder, signed the Contract on behalf of BPI. The Contract provided that BPI could request

progress payments from the government as reimbursement for its costs before the Contract was completed, provided that defendants could certify that BPI had purchased parts to perform the Contract, had obtained title to the parts, and had fully paid for the parts or would pay for them as payments came due in the ordinary course of business.

On June 27, 1979, BPI submitted its first progress payment request ("June 1979 Request"), signed by Elkin, requesting reimbursement in the amount of $112,179.60 for four of the parts needed for the assembly of the globe stop valves. Elkin certified that BPI had paid, or intended in the ordinary course of business to pay, Etoile Machine and Tool Co., Inc. ("Etoile"), approximately $131,000 for these parts. The request was accompanied by a copy of an invoice purporting to show that Etoile had charged BPI $131,000 for the parts. The evidence showed that this claim was false in several respects.

To begin with, Etoile was a sham company, incorporated by Elkin's attorney at Elkin's request. Etoile did not produce the parts in question; its business existence consisted solely of a telephone located in the home of Robert Dohn, a former BPI employee. The testimony revealed that Elkin had instructed Dohn to answer the telephone in the name "Etoile," to inform government inspectors who called that the globe stop valve parts had been shipped to R & H Manufacturing Company ("R & H") for finishing, and to refer all inquiries to Elkin. In fact, BPI had engaged Excelsior Brass Company ("Excelsior") to produce these and other parts and R & H to finish them. The testimony revealed that BPI was eventually charged approximately $45,000 for these unfinished parts, rather than the $131,000 claimed in the progress payment re-

quest.[1] Further, BPI did not have title to the parts at the time it requested the progress payments, since production of the parts was not actually completed by Excelsior until several months after BPI submitted its request. Finally, the evidence showed that BPI has yet to make any payments to Excelsior and R & H for their work.

As a result of the June 1979 Request, defendants received a check from the Department of Defense in August 1979 in the amount of $65,142. Several months later, defendants defaulted on the Contract, and the Department of Defense has never received any of the globe stop valves, nor any of the parts for which it issued the progress payment.

In the course of investigating BPI's performance to determine whether BPI was entitled to keep the progress payment, the Department of Defense asked Elkin's attorney to supply proof that Etoile had made the parts and had been paid for them. In response, Elkin provided his attorney with a letter of verification (the "Verification Letter") purportedly signed by Elkin's accountant, which the attorney mailed to the Department of Defense in December 1981. In fact, however, the letter was false and had not been written, signed, or authorized by the accountant. The attorney's mailing of the Verification Letter was the mailing charged in the mail fraud count of the indictment.

Despite defendants' efforts to conceal their fraud, they became the subject of a grand jury investigation. Dohn, the former BPI employee who had maintained and answered the Etoile telephone, testified before the grand jury that Elkin had instructed him to lie to the grand jury by stating that Elkin had nothing to do with Etoile or the

---

1 There was no evidence as to how much R & H charged BPI for finishing the parts.

telephone in Dohn's home and that Etoile was the tool of Elkin's former attorney, who had incorporated the company at Elkin's request. Elkin also instructed his accountant to testify falsely to the grand jury that all records relating to the Contract had been destroyed during a burglary.

Eventually, both defendants were indicted for mail fraud in connection with the mailing of the Verification Letter to cover up the fraudulent June 1979 Request, in violation of § 1341; for making false statements in connection with the June 1979 Request, in violation of § 1001; and for submitting the false June 1979 claim for payment from the government, in violation of § 287. In addition, Elkin was indicted for obstruction of justice, in violation of § 1503.

B. *The Sentencing*

Defendants were convicted on all counts. Invoking 18 U.S.C. § 3651, the court suspended the imposition of sentence on both defendants and placed Elkin on probation for a period of five years. As a condition of that probation, the court ordered that Elkin make restitution (1) to the government in the amount of $119,534, (2) to Excelsior in the amount of $69,785, and (3) to R & H in the amount of $29,840. The court did not place BPI on probation but ordered it to make the same restitution. In setting the amount of restitution to be made to the government at $119,534, the court noted that the presentence report on the defendants disclosed that in addition to the $65,142 defendants had received in August 1979, which formed the basis for the present indictment and trial, defendants had received two additional progress payments from the government totaling $54,392.

C. *The Issues on Appeal*

On appeal, defendants raise a number of challenges to the validity of their convictions and their sentences. Primarily, they contend (1) that the mailing of the Verification Letter was insufficient to satisfy the mailing requirement of § 1341, (2) that the trial court erred in not submitting to the jury the question whether the falsities in defendants' false claim and false statements were material, and (3) that the sentences impermissibly require them to make restitution of amounts not charged in the indictment. We have considered all of defendants' contentions and find those challenging the convictions to be without merit. We conclude, however, that the trial judge erred in suspending sentence on BPI without placing it on probation, and we agree that he exceeded his authority in ordering restitution as to amounts of money that were allegedly owed by defendants but were not charged in the indictment and proven at trial. Accordingly, we vacate the judgments and remand for resentencing.

II. VALIDITY OF THE CONVICTIONS

A. *Mailing*

Defendants contend that the mail fraud count of the indictment must be dismissed because the government, by relying only on the mailing by Elkin's attorney of the Verification Letter more than two years after defendants received the first progress payment, failed to produce evidence of a mailing "for the purpose of executing [any] scheme or artifice [to defraud]" within the meaning of § 1341.[2] Defendants contend that the fraud came to

---

[2] Defendants contend also that the testimony of their attorney that she mailed the Verification Letter on the instructions of Elkin should have

fruition with the receipt of the progress payment in August 1979 and that, therefore, the mailing of the Verification Letter in December 1981 was not sufficiently related to the scheme to bring defendants within the reach of the mail fraud statute.

We disagree. The government established at trial both that the Verification Letter was false and that it was "a necessary step in executing the scheme[] because it was designed to lull" the Department of Defense into believing that the progress payment had been properly made. *United States v. Angelilli*, 660 F.2d 23, 36 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982). Thus, the fact that the Verification Letter was mailed after the defendants received the progress payment in no way suggests that it was not sent in furtherance of the scheme to defraud.

Defendants' reliance on *United States v. Maze*, 414 U.S. 395 (1974), is misplaced. In *Maze*, the defendant had purchased food and lodging with a stolen bank credit card; the mailings charged in the indictment were the mailings by the merchants of the bills to the bank and the mailing by the bank of a bill to the owner of the stolen card. The Court concluded that these mailings were not within the contemplation of § 1341 because they could not have served to conceal the fraud but only to disclose it. In the present case, in contrast, the Verification Letter was mailed by the defendants to the defrauded party in order to conceal the falsity of the June 1979 Request and to increase the chances that defendants would retain the

---

been excluded from evidence on grounds of attorney-client privilege. This argument borders on the frivolous. The attorney-client privilege attaches only to a client's confidential communications to his attorney for the purpose of seeking legal advice. *See United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *accord In re Horowitz*, 482 F.2d 72, 80-81 n.7 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). The privilege does not protect a client from the disclosure that he instructed the attorney to place a document in the mail.

fruits of their fraud. Plainly the mailing here played an integral role in the scheme, and there is no basis for disturbing the mail fraud convictions.

B. *Materiality*

In instructing the jury with respect to the counts charging defendants with violations of 18 U.S.C. §§ 287 and 1001, the trial court informed the jury that the materiality of the facts falsified was a matter to be determined by the court and that the court had determined that the facts that the indictment alleged had been falsified were material facts. Defendants contend that questions of materiality under §§ 287 and 1001 are to be decided by the jury as a matter of fact and that the trial court erred in not submitting the questions of materiality to the jury. We disagree.

1. *Section 1001*

Section 1001 of 18 U.S.C. makes it unlawful for a person within the jurisdiction of any department or agency of the United States to falsify or conceal a material fact or to "make[] any false, fictitious or fraudulent statements or representations, or make[] or use[] any false writing or document knowing the same to contain any false, fictitious or fraudulent statement." It is settled in this Circuit that materiality is not an element of the offense of making a false statement in violation of § 1001. *United States v. Rinaldi*, 393 F.2d 97, 99-100 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968); *United States v. Aadal*, 368 F.2d 962, 964 (2d Cir. 1966), *cert. denied*, 386 U.S. 970 (1967); *see United States v. Silva*, 715 F.2d 43, 49-50 (2d Cir. 1983). Moreover, courts that have considered materiality to be an element of an offense charged under § 1001 have ruled that the question is one of law to

be decided by the court, not one of fact for the jury. *E.g.*, *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975). Accordingly, we see no error in the trial court's refusal to submit to the jury the question of whether defendants' misrepresentations were material.

2. *Section 287*

Section 287 of 18 U.S.C. makes it unlawful to present to any department or agency of the military service of the United States "any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent." Although this Court has not previously decided whether materiality is an element of a violation of § 287, we have held that the similar language of 18 U.S.C. § 80 (1934), a precursor to § 287, did not require a finding that the falsity in the claim was material. *See United States v. Presser*, 99 F.2d 819, 822 (2d Cir. 1938).[3] Since the language of § 287 in no way suggests that materiality is an element of the offense, we conclude that proof of materiality was not required. *Accord United States v. Irwin*, 654 F.2d 671, 682 (10th Cir. 1981) (legislative history of § 287 does not indicate that Congress intended that materiality be an element), *cert. denied*, 455 U.S. 1016 (1982); *but see United States v. Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980) (requiring proof of materiality); *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974) (same).

Even were we to conclude, however, that materiality is an element of a § 287 offense, we would be inclined to agree with the Fifth Circuit that, as in the § 1001 context, the issue of materiality would be one reserved to the trial

---

[3] Section 287 was based on the 1940 edition of 18 U.S.C. § 80, whose language was identical to that of the 1934 edition of § 80 at issue in *Presser*.

court for decision as a matter of law. *See United States v. Haynie*, 568 F.2d 1091, 1092 (5th Cir. 1978). Consequently, we find no error in the trial court's refusal to submit to the jury any issue of materiality with respect to the § 287 count.

III. THE SENTENCING

Defendants contend that the sentencing court's orders of restitution were impermissible in two respects. First, they contend that since the indictment charged, and the trial evidence proved, only that they unlawfully obtained one progress payment of $65,142, the court had no authority to require that they make restitution to the government of any amounts in excess of that figure. Second, they contend that the court lacked the authority to order them to make restitution to the subcontractors of any amounts allegedly owing to them. We agree with both contentions, and find, in addition, a fundamental flaw in the sentencing court's treatment of BPI.

A. *The Treatment of BPI*

We confront first the sentencing court's treatment of BPI. The court suspended the imposition of sentence on BPI and ordered it to make restitution to the government and the subcontractors. The court did not, however, place BPI on probation, and this failure makes the treatment of BPI void.

Assuming there have been no flaws in the judicial processes leading to the conviction of a defendant, a federal judge has no inherent power to suspend either the imposition or the execution of sentence on the defendant. *Ex Parte United States*, 242 U.S. 27, 51-52 (1916). The only source of the power to suspend sentence is 18 U.S.C.

§ 3651, which provides that the court "may suspend the imposition or execution of sentence and place the defendant on probation." *See United States v. Murray*, 275 U.S. 347, 357 (1928); *Fiore v. United States*, 696 F.2d 205, 207 (2d Cir. 1982). Under § 3651, however, the court has "no power to suspend a sentence without also imposing a term of probation." *United States v. Ellenbogen*, 390 F.2d 537, 541 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968). Thus, a judgment that purports to suspend sentence without imposing probation is a nullity. *Miller v. Aderhold*, 288 U.S. 206, 210-11 (1933); *United States v. Corson*, 449 F.2d 544, 550 (3d Cir. 1971); *United States v. Fried*, 436 F.2d 784, 787 (6th Cir.), *cert. denied*, 403 U.S. 934 (1971). Accordingly, since the court did not place BPI on probation, its suspension of sentence on BPI was void.[4]

The absence of a condition of probation likewise makes void the court's order that BPI make restitution. The federal court has no inherent power to order a convicted defendant to make restitution. The court's otherwise broad discretion to determine the punishment to be imposed on a defendant is circumscribed by the sentencing limitations established by statute. *United States v. Tucker*, 404 U.S. 443, 446-47 (1972). Just as the federal court has no inherent power to try criminal charges that are not based on a federal statute, *United States v. Hudson*, 11 U.S. (7 Cranch) 21 (1812), and no power in the absence of statute to refuse to impose punishment after a proper conviction, *Ex parte United States*, *supra*, it has no

---

[4] In light of the sentencing court's order that BPI make restitution, the fact that the court's suspension of sentence without an order of probation was void does not deprive this Court of jurisdiction to hear BPI's appeal. "[C]ertainly when discipline has been imposed, the defendant is entitled to review." *Korematsu v. United States*, 319 U.S. 432, 434 (1943).

inherent power to impose punishments that are not provided for by a federal statute applicable to the offense for which the defendant was convicted, *United States v. Best*, 573 F.2d 1095, 1101 (9th Cir. 1978); *see Fiore v. United States*, *supra*, 696 F.2d at 209.[5] In the present case the only source of the court's power to order restitution is 18 U.S.C. § 3651,[6] which provides that [w]hile on probation and among the conditions thereof, the defendant . . . [m]ay be required to make restitution . . . ." Since the court did not place BPI on probation, the order that BPI make restitution was not a condition of probation and hence was not authorized by § 3651.

It is unclear, in light of the court's imposition of a condition of probation on Elkin, whether the court intended to impose such a condition on BPI as well. No reason appears in the record to explain the difference in the treatments of the two defendants, and the court's attempt to impose an order of restitution suggests that the court sought to deal with BPI under § 3651. Nevertheless, since BPI was not in fact placed on probation, both the suspension of the imposition of sentence and the order

---

5 The court may not, for example, impose a fine in excess of the statutory maximum provided by Congress for the offense, whether or not the fine is imposed as a condition of probation. *See Fiore v. United States*, *supra*; *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980).

6 In enacting the Victim and Witness Protection Act of 1982, Congress added § 3579 to title 18 U.S.C., which, with respect to offenses occurring after January 1, 1983, permits the sentencing court to order a convicted defendant to make restitution to any victim of the offense, independently of whether the defendant is placed on probation. The Senate Judiciary Committee Report accompanying the bill that included § 3579 pointed out that "[s]ection 3579 permits the court, for the first time, to order payment of restitution independently of a sentence of probation. . . . Current law does not contain a provision covering an order of restitution as a part of any sentence other than probation." S. Rep. No. 97-532, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 2515, 2536.

that BPI make restitution were beyond the court's power. Accordingly, the judgment against BPI must be vacated and the matter remanded for the imposition of a valid sentence on it. We turn now to the matter of the propriety of the court's orders of restitution to the government and the subcontractors.

B. *Restitution to the Government*

In ordering the defendants to make restitution to the government in the amount of $119,534, the trial court took into account the fact that the presentence report on the defendants stated that in addition to the payment of $65,142 received following the June 1979 Request, defendants had requested and received two additional progress payments totaling $54,392. The government thus contends that the restitutionary order was proper because $119,534 represented the total actual damages the government suffered as a result of defendants' fraudulent scheme. It argues that particularly in a case involving not an isolated offense, but a complex scheme to defraud, the amount of restitution that a court may lawfully order should not be limited by the amount charged in the indictment. This argument is unsupportable.

The restitutionary provision of § 3651 is as follows:

> While on probation and among the conditions thereof, the defendant—
>
> . . . .
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had;
>
> . . . .

In *United States v. Tiler*, 602 F.2d 30 (2d Cir. 1979), we noted that the "well-settled construction" of this provi-

sion "is that restitution may be ordered as a condition of probation only for actual damages flowing from the specific crime charged in the indictment of which the defendant is convicted either after a trial or a plea of guilty." *Id.* at 33. Similarly, in *Fiore v. United States*, *supra*, 696 F.2d at 209, we stated that the provisions of § 3651 do not "allow the sentencing court to impose fees and charges at will on the defendant. . . . Nor may the defendant be required to pay reparations for crimes of which he has not been specifically convicted."

In the present case, the indictment did not charge that the government had paid $119,534 in fraudulent claims; it focused only on the first fraudulent request for a progress payment and charged only that the government had paid defendants $65,142. Nor did the proof at trial show that the government had paid the defendants any more than the $65,142 charged. Thus, the government neither pleaded nor proved what it now claims are its actual damages. When asked at oral argument of this appeal why the indictment and proof were so limited, the government responded that it was easier for it to prove a case against the defendants if the charges were limited to the first progress payment. We appreciate the government's candor, but we would consider it manifestly unfair for the government to be allowed to narrow its case in order to avoid being put to its proof as to other progress payments, and yet collect for those other payments on the basis of its assertion that it is due the larger amounts.

In seeking to uphold the award of restitution to it in the larger amount, the government points to the Ninth Circuit's decision in *Phillips v. United States*, 679 F.2d 192 (9th Cir. 1982), involving a mail fraud prosecution in which the court upheld a restitutionary award that was greater than any of the sums charged in the undismissed

counts of the indictment. The government's reliance is misplaced. In *Phillips*, the ruling turned on the fact that the defendant had entered a guilty plea to several counts of the indictment, and as part of his plea bargain *he had agreed* to make the restitutionary payments of which he subsequently complained. Thus, the court of appeals, after noting that restitution generally may be made a probation condition only for amounts in counts upon which there was a conviction, *id.* at 194, ruled that a defendant who agrees to make restitution in greater amounts may be compelled to honor his agreement:

> We feel that when a defendant consents pursuant to a plea agreement to pay such a restitutionary amount and such plea bargain is fully explored in open court and the defendant thereafter signs a stipulation to the effect that restitution in such a sum is to be paid, then the Court is bound by law to carry out that specific agreement.

Id. Accord United States v. Landay, 513 F.2d 306, 308 (5th Cir. 1975) (amount of restitution proper since defendant "freely and voluntarily admitted [owing that] exact amount"); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.) (judge could "properly require, as a condition of probation, payment of those taxes reported by the defendant as due for 1958, 1959 and 1960 since such liability is admitted"), *cert. denied*, 371 U.S. 894 (1962).

In contrast, the defendants here have neither agreed to make restitution nor admitted liability for the other two progress payments. We are unimpressed by the government's argument that defendants have in effect admitted liability for the entire $119,534 by failing to examine the presentence report and to protest the award at the sentencing. As the government concedes, defendants were

under no obligation to review the presentence report, and, as we observed in *Fiore v. United States*, *supra*, 696 F.2d at 209, "[a] presentence report is not the place to decide a defendant's . . . liability." *Accord United States v. Brown*, 699 F.2d 704, 711 (5th Cir. 1983). Because defendants' liability for the second two progress payments is a matter "not . . . conceded by [defendants] or tried by the court below," *Fiore v. United States*, *supra*, 696 F.2d at 209, defendants may not be required to pay those additional sums.

C. *Restitution to the Subcontractors*

For several reasons we also conclude that the order that the defendants make restitution of $69,785 to Excelsior and $29,840 to R & H was improper. Under § 3651, a defendant may be required to make restitution only to "*aggrieved parties* for actual damages or loss *caused by the offense* for which conviction was had." (Emphasis added.) This provision allows an order of restitution "only for actual damages flowing from the specific crime charged in the indictment of which the defendant is convicted." *United States v. Tiler*, *supra*, 602 F.2d at 33. On the record before us, we are unable to conclude that the amounts ordered constituted the subcontractors' "actual damages." Further, we are unable to view the subcontractors as parties "aggrieved" by the crimes charged, since, even assuming that BPI owes Excelsior $69,785 and R & H $29,840, those debts did not flow from the crimes of mail fraud or submitting false statements and a false claim to the government. Although the defendants used Excelsior and R & H in order to defraud the government, defendants' failure to pay these companies for their services resulted not from the crime of defrauding the government, but from an independent breach of the

contracts defendants had with them. BPI presumably would owe the subcontractors those sums even if it had not requested or received a cent from the government. Thus, there has been no showing that the subcontractors' actual damages—whatever they may be—were "caused by" the offenses of which the defendants were convicted.

The government argues that the order of restitution to the subcontractors may be sustained either on the basis that § 3651 permits the court to order a payment to the "vehicle" of the defendants' frauds (Government's brief on appeal at 42-43), or on the basis that it was within "the sentencing court's general probation power" because it was "consistent with the rehabilitation of these defendants." (*Id.* at 43.) We are unpersuaded. In support of its "vehicle" theory, the government relies principally on *United States v. Margala*, 662 F.2d 622 (9th Cir. 1981), in which Margala had engaged in a complex scheme to defraud and freeze out the stockholders of a corporation, and the Ninth Circuit upheld a condition of probation requiring him to forfeit pension benefits and stock he had acquired in another corporation that was a vehicle for the fraudulent scheme. We do not find in *Margala* support for the action taken in the present case. Although the *Margala* court quoted portions of § 3651 that deal with the impositions of fines and requirements of restitution, the district court's orders in *Margala* were not restitutionary. Restitution is defined as the "restoration of anything to its rightful owner," Black's Law Dictionary 1477 (4th ed. 1951), and there is no indication that Margala did not give full value for the stocks or pension benefits. *But cf. Fiore v. United States*, *supra*, 696 F.2d at 210 n.4 (hypothesizing that the *Margala* forfeiture order could be covered by the restitutionary provisions of § 3651). Rather, *Margala* falls under the provisions of

§ 3651 that give the sentencing judge broad discretion to fashion probationary conditions that he believes will serve the ends of justice. Notwithstanding this general broad discretion, the statute provides that where restitution is a condition of probation, specific criteria must be met. We construe Congress's specific limitations as circumscribing the court's general power under the statute to order restitution. *See United States v. Prescon Corp.*, 695 F.2d 1236, 1243 (10th Cir. 1982).

CONCLUSION

The convictions are affirmed. The judgments are vacated, and the case is remanded to the district court for resentencing. The mandate shall issue forthwith.

No. 83-1848

In the Supreme Court of the United States

OCTOBER TERM, 1984

BERNARD P. ELKIN AND BOSTON PNEUMATICS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

1 app

QUESTIONS PRESENTED

1. Whether the district court was required to submit to the jury the question of the materiality of petitioners' false statements in a prosecution under 18 U.S.C. 287 and 1001.

2. Whether a letter falsely certifying that petitioners had incurred certain costs in connection with a government defense contract supported their conviction under 18 U.S.C. 1341.

3. Whether petitioner Elkin's conversations with his former attorney concerning a sham company used by petitioners to defraud the government were protected by the attorney-client privilege.

4. Whether the trial court abused its discretion in refusing to excuse a juror who had "dozed a couple of times" during the trial.

5. Whether a corporate defendant may be sentenced to probation under 18 U.S.C. 3651.

6. Whether miscellaneous alleged misconduct by the government and the district court denied petitioners a fair trial.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Abadi v. *United States*, cert. denied, No. 82-1954 (Oct. 3, 1983) 4

Clark v. *United States*, 289 U.S. 1 8

Cox v. *United States*, cert. denied, No. 82-2069 (Oct. 3, 1983) 4

Falco v. *United States*, cert. denied, No. 82-882 (Apr. 4, 1983) 4

Grand Jury Proceedings, In re, 689 F.2d 1352 8

Grand Jury Proceedings, Vargas, In re, 723 F.2d 1461, petition for cert. pending on other grounds *sub nom.* *Vargas* v. *United States*, No. 83-1756 8

Isenberg v. *United States*, cert. denied, No. 82-967 (May 16, 1983) 4

Johnson v. *United States*, 410 F.2d 38, cert. denied, 396 U.S. 822 5

Page

Cases—Continued:

Meyerhofer v. *Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, cert. denied, 419 U.S. 998 8

Sinclair v. *United States*, 279 U.S. 263 5

United States v. *Angelilli*, 660 F.2d 23, cert. denied, 455 U.S. 910 7

United States v. *Atlantic Richfield Co.*, 465 F.2d 58 10

United States v. *Bernard*, 384 F.2d 915 5

United States v. *Brown*, 605 F.2d 389, cert. denied, 444 U.S. 972 10

United States v. *Cameron*, 464 F.2d 333 9

United States v. *Carrier*, 654 F.2d 559 6

United States v. *Clancy*, 276 F.2d 617 5

United States v. *Deep*, 497 F.2d 1316 6

United States v. *Dyer*, 722 F.2d 174 8

United States v. *East*, 416 F.2d 351 6

United States v. *Fern*, 696 F.2d 1269 5

United States v. *Haynie*, 568 F.2d 1091 5

United States v. *Hoffa*, 349 F.2d 20, aff'd, 385 U.S. 293 8

United States v. *Irwin*, 654 F.2d 671, cert. denied, 455 U.S. 1016 ..... 5, 6

United States v. *Ivey*, 322 F.2d 523, cert. denied, 375 U.S. 953 5

Page

Cases—Continued:

United States v. *Lustig*, 555 F.2d 737, cert. denied, 434 U.S. 1045 10

United States v. *McIntosh*, 655 F.2d 80, cert. denied, 455 U.S. 948 5

United States v. *Moore*, 580 F.2d 360, cert. denied, 439 U.S. 970 9

United States v. *Panebianco*, 543 F.2d 447, cert. denied, 429 U.S. 1103 9

United States v. *Pruitt*, 702 F.2d 152 5

United States v. *Richmond*, 700 F.2d 1183 5

United States v. *Sears*, 663 F.2d 896, cert. denied, 455 U.S. 1027 9

United States v. *Talkington*, 589 F.2d 415 6

United States v. *Valdez*, 594 F.2d 725 ..... 5, 6

United States v. *Voorhees*, 593 F.2d 346, cert. denied, 411 U.S. 936 6

United States v. *Wright Contracting Co.*, 563 F. Supp. 213 10

Weinstock v. *United States*, 231 F.2d 699 5

Statutes:

18 U.S.C. 287 ..... 1, 3, 4, 5, 6

18 U.S.C. 1001 ..... 2, 3, 4, 5, 6

18 U.S.C. 1341 ..... 2, 7

18 U.S.C. 1503 2

Page

Statutes—Continued:

18 U.S.C. 1623 4

18 U.S.C. 3651 9

Miscellaneous:

2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977 & Supp. 1980) 5

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1848

BERNARD P. ELKIN AND BOSTON PNEUMATICS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 731 F.2d 1005.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1984. The petition for a writ of certiorari was filed on May 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of (1) filing a false payment claim on a government defense contract, in violation of 18 U.S.C. 287; (2) submitting false statements in connection with that claim,

in violation of 18 U.S.C. 1001; and (3) mail fraud, in violation of 18 U.S.C. 1341. Petitioner Elkin also was convicted of obstructing the grand jury's investigation of the false payment claim, in violation of 18 U.S.C. 1503.[1] Elkin was sentenced to a five-year term of probation and was ordered to pay restitution in the amounts of $119,534 to the government and a total of $99,625 to two subcontractors. The district court suspended imposition of sentence on petitioner Boston Pneumatics, Inc. (BPI), but ordered BPI to pay the same restitution imposed upon Elkin. The court of appeals affirmed petitioners' convictions, but vacated their sentences and remanded for resentencing. Pet. App. 1a-19a.[2]

The evidence, as set out in the opinion of the court of appeals (Pet. App. 3a-6a), showed that in August 1978 the United States Department of Defense awarded BPI a contract to produce globe stop valves. On June 27, 1979, Elkin, BPI's president and principal shareholder, submitted a false $112,179.60 claim for a progress payment on the contract, representing that BPI had incurred expenses of $131,000 for parts allegedly purchased from Etoile Machine and Tool Co., Inc. In fact, Etoile was a sham company formed by Elkin, whose business existence consisted solely of a telephone located in the home of a BPI employee whom Elkin had instructed to answer in the name of Etoile. Furthermore, another company had produced the parts and had

---

[1]Elkin was acquitted on another obstruction count. See Tr. 1364-1366, 1418.

[2]The court of appeals concluded that since the district court had not placed BPI on probation, it had no power to suspend the imposition of sentence or to impose restitution on that petitioner (Pet. App. 11a-14a). The court also held that the district court lacked the power to impose restitution in an amount that exceeded the fraudulent claims charged and proven at trial, or to require any restitution to the subcontractors who did not sustain any financial loss from petitioners' crimes (*id.* at 14a-19a).

billed BPI $45,000, rather than the $131,000 Elkin had alleged in the payment claim. In August 1979, the government paid Elkin $65,142 on the basis of the June 27 payment claim. Several months later, BPI defaulted on the contract without providing the government any globe stop valves or parts.

During its investigation of BPI's performance to determine whether BPI was entitled to keep the progress payment, DOD requested Elkin's attorney to supply proof that Etoile had made the contracted-for parts and had been paid for them. In response, in December 1981 Elkin provided his attorney, and the attorney mailed to DOD, a "verification letter" purportedly signed by Elkin's accountant, which falsely certified that Etoile had made the parts and had been paid for them.[3]

Petitioners subsequently became the subject of a grand jury investigation. Dohn, the former BPI employee who had maintained and answered the Etoile telephone, testified that Elkin had instructed him to misrepresent to the grand jury that Elkin had nothing to do with Etoile and that Etoile was the tool of Elkin's former attorney, who had incorporated Etoile at Elkin's request. Dohn further testified that Elkin had instructed him to state falsely to the grand jury that all records relating to the globe stop valves contract had been destroyed during a burglary.

ARGUMENT

1a. Petitioner contends (Pet. 9-12) that the court of appeals erred, and thereby created a conflict among the circuits, in stating (Pet. App. 9a-10a) that materiality is not an essential element of either 18 U.S.C. 1001 or 287. Whatever conflict may exist among the courts of appeals on

---

[3]Indeed, BPI had made no payments to any company for the parts (Pet. App. 5a).

that issue, however, does not warrant resolution by the Court in the context of this case, since the false claim in this case was undeniably material to the making of the progress payment and a finding of materiality was in fact made in the district court. In its charge to the jury, the district court unequivocally instructed that, in order to establish an offense under Section 1001, it must be proved beyond a reasonable doubt "[t]hat the false statement or false document related to a material matter" (Tr. 1371). Likewise, the court charged with respect to Section 287 that "[t]he making or presentation of a false claim is not an offense unless the falsity relates to a 'material' fact" (Tr. 1373).

b. Petitioner also argues (Pet. 12-13) that the courts below erred in ruling that materiality is a question of law to be decided by the court (Pet. App. 9a; Tr. 1372-1373).[4] This Court has recently denied certiorari in cases presenting the same contention in the context of prosecutions brought under 18 U.S.C. 1001 and 1623. *Cox* v. *United States*, No. 82-2069 (Oct. 3, 1983) (18 U.S.C. 1001); *Abadi* v. *United States*, No. 82-1954 (Oct. 3, 1983) (18 U.S.C. 1001); *Isenberg* v. *United States*, No. 82-967 (May 16, 1983) (18 U.S.C. 1001); *Falco* v. *United States*, No. 82-882 (Apr. 4, 1983) (18 U.S.C. 1623). There is no reason for a different result here.[5]

Contrary to petitioners' suggestion (Pet. 12-13), the great weight of authority among the courts of appeals is consistent with the view that the issue of materiality under both 18 U.S.C. 1001 and 287 is for the court to determine. See, *e.g.*,

---

[4]With respect to both the Sections 1001 and 287 offenses, the district court instructed the jury (Tr. 1372-1373) that "[t]he issue of materiality, however, is not submitted to you for your decision but is a matter to be determined by the Court. You are instructed that the alleged facts, charged in the indictment as having been falsified, would be material facts."

[5]Petitioners have suggested no distinction between Sections 287 and 1001 for purposes of this issue.

United States v. *Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983) (Section 287); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983) (Section 1001); *United States* v. *Fern*, 696 F.2d 1269, 1274 (11th Cir. 1983) (Section 1001); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982) (Section 1001); *United States* v. *Haynie*, 568 F.2d 1091, 1092 (5th Cir. 1978) (Section 287); *Johnson* v. *United States*, 410 F.2d 38, 46 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (Section 287); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967) (Section 1001); *United States* v. *Ivey*, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963) (Section 1001); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960) (Section 1001); *Weinstock* v. *United States*, 231 F.2d 699, 703 (D.C. Cir. 1956) (Section 1001).[6] Petitioners suggest, however, that the better rule is found in the Ninth and Tenth Circuits, which have approved the practice of submitting the question of materiality to the jury. See, *e.g.*, *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).

---

[6]See also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1980). Moreover, this Court has recognized that the materiality of false statements generally is a question for the court. In *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929) (citation omitted), construing the pertinency requirement of a statute proscribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

Nevertheless, petitioners have cited no case, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 or 287 on the ground that the issue of materiality was not submitted to the jury. Although the Ninth Circuit has held in two cases that the trial court erred in itself deciding the question of materiality rather than submitting it to the jury, in both cases it affirmed the convictions because it was clear that the statements at issue were material. See *United States* v. *Valdez*, 594 F.2d at 729; *United States* v. *East*, 416 F.2d 351, 354-355 (1969). The Tenth Circuit has not addressed the question whether a trial court commits reversible error by deciding the question of materiality. See *United States* v. *Irwin*, 654 F.2d at 677 n.8, and cases cited therein.[7]

Here, there can be no possible doubt that petitioners' false statements concerning BPI's performance of the government contract were material, *i.e.*, that they "could affect or influence the exercise of governmental functions" and had a "natural tendency to influence * * * agency decision." *United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir. 1981). Petitioner does not contend otherwise. See also *United States* v. *Voorhees*, 593 F.2d 346, 350 (8th Cir.), cert. denied, 411 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false statement was not material on the ground that it

---

[7]The remainder of the cases cited by petitioners also do not advance their argument. Most simply reiterate that materiality is an essential element of Section 1001 without considering whether the question of materiality is one for the court or the jury. See *United States* v. *Voorhees*, 593 F.2d 346, 349 (8th Cir.), cert. denied, 411 U.S. 936 (1979); *United States* v. *Talkington*, 589 F.2d 415, 416 (9th Cir. 1979); *United States* v. *Deep*, 497 F.2d 1316, 1321 (9th Cir. 1974) (en banc). Moreover, as the more recent cases cited in the text above demonstrate (see page 5, *supra*), to whatever extent *Voorhees* suggests that the question of materiality is one for the jury rather than the court, it is not the law presently prevailing in the Eighth Circuit.

was incapable of producing illegal payments). Because the materiality of petitioners' statements was clearly established, there is no reason to believe that any other court of appeals would have granted petitioners the relief they seek. Thus, to whatever extent a conflict may exist, the present case does not provide an appropriate occasion for this Court to address it.

2. Petitioners' mail fraud conviction was based on the December 1981 mailing of the "verification letter" falsely certifying that Etoile had produced the parts and had billed BPI $131,000 for them. Petitioners' contention (Pet. 15-16) that the mailing, which post-dated petitioners' receipt of the progress payment by two years, was not sufficiently related to the fraudulent scheme to justify their conviction under 18 U.S.C. 1341 was correctly rejected by the court of appeals (Pet. App. 8a (bracket in original)): "The government established at trial both that the Verification Letter was false and that it was 'a necessary step in executing the scheme[] because it was designed to lull' the Department of Defense into believing that the progress payment had been properly made. *United States v. Angelilli*, 660 F.2d 23, 36 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982). Thus, the fact that the Verification Letter was mailed after [petitioners] received the progress payment in no way suggests that it was not sent in furtherance of the scheme to defraud."[8]

---

[8]As the court of appeals further observed (Pet. App. 8a-9a):

> [Petitioners'] reliance on *United States v. Maze*, 414 U.S. 395 (1974), is misplaced. In *Maze*, the defendant had purchased food and lodging with a stolen bank credit card; the mailings charged in the indictment were the mailings by the merchants of the bills to the bank and the mailing by the bank of a bill to the owner of the stolen card. The Court concluded that these mailings were not within the contemplation of § 1341 because they could not have served to conceal the fraud but only to disclose it. In the present case, in contrast, the Verification Letter was mailed by [petitioners] to the defrauded party in order to conceal the falsity of the

3. Petitioners' contention (Pet. 17-18) (which the court of appeals did not deem even worthy of mention) that the government's use at trial of the testimony of Elkin's former attorney violated the attorney-client privilege is baseless. That witness testified concerning Elkin's instruction to him to incorporate Etoile (Tr. 815-856). Since Etoile was a sham company formed and used by petitioners for the sole purpose of defrauding the government, petitioners' communications with counsel concerning incorporation of that entity were in furtherance of the crime and therefore are wholly outside the protection of the privilege. See *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983), petition for cert. pending on other grounds *sub. nom. Vargas* v. *United States*, No. 83-1756; *United States* v. *Dyer*, 722 F.2d 174, 177 (5th Cir. 1983); *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982) (per curiam); *United States* v. *Hoffa*, 349 F.2d 20, 37 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966). Beyond this, petitioners' position at trial (Tr. 292-294, 297, 654, 838-849, 910-935, 1087) that their former attorney was solely responsible for creating Etoile and for the false claims waived the protection of the privilege they now seek. Cf. *Meyerhofer* v. *Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1194-1195 (2d Cir.), cert. denied, 419 U.S. 998 (1974).

4. Petitioners' claim (Pet. 18-19) that they were denied a fair trial by the district court's refusal to excuse a juror who allegedly had slept during "about eighty percent" of the trial is baseless. At the conclusion of the government's case, petitioners requested the district court to dismiss a juror whom they claimed had slept during most of the trial (Tr.

June 1979 Request and to increase the chances that [petitioners] would retain the fruits of their fraud. Plainly the mailing here played an integral role in the scheme * * *.

862). In response to questioning by the court, the juror admitted that he had "dozed a couple of times" (Tr. 863). After defense counsel declined the court's invitation to question the juror further (Tr. 863), the court denied the motion to remove him (Tr. 869). In these circumstances, the court's refusal to dismiss the juror was within its discretion and did not taint the fairness of the trial. See *United States* v. *Sears*, 663 F.2d 896, 900 (9th Cir. 1981), cert. denied, 455 U.S. 1027 (1982) (district court did not abuse its discretion in refusing to dismiss a hearing-impaired juror because it "had the opportunity to observe the juror closely before deciding that his hearing difficulty would not deny defendant's right to due process or a fair trial"); *United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977) ("[b]ecause of his continuous observation of the jury in court, a trial judge's handling of alleged juror misconduct or bias is only reviewable for abuse of discretion"). Cf. *United States* v. *Cameron*, 464 F.2d 333, 334-335 (3d Cir. 1972) (citation omitted) (district court did not abuse its discretion in removing a juror who had greeted a key defense witness and who, the court believed, had slept " 'at least 50 percent of the time' "). See also *United States* v. *Moore*, 580 F.2d 360, 364-365 (9th Cir.), cert. denied, 439 U.S. 970 (1978) (the defendant's failure to raise an objection to a sleeping juror sooner constituted improper "gamesmanship").

5. As noted above (note 2, *supra*), the court of appeals vacated the imposition of a restitutionary remedy on BPI and remanded for resentencing on the grounds that the sentencing court lacked the power to impose restitution except as a condition of probation under 18 U.S.C. 3651 and that the district court had not placed BPI on probation. Petitioners contend (Pet. 14-15) that the court of appeals erred in adopting the view that probation may be imposed on a corporation under Section 3651. That view, however,

is consistent with the position adopted by the other federal courts that have ruled on the question (see, *e.g.*, *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972); *United States* v. *Wright Contracting Co.*, 563 F. Supp. 213 (D. Md. 1983)) and does not warrant review by this Court.

6. Petitioners' various other contentions (Pet. 19), which are unsupported by any argument or authority, require little response.

Petitioners' assertion (Pet. 19) that Elkin's wife was "called by the government as a witness concerning marital conferences" is soundly refuted by the record. Elizabeth Sheppard, Elkin's purported wife, testified that invoices on her company's letterhead falsely reflected that petitioners had purchased certain parts from her (Tr. 769-770). Such testimony did not remotely involve privileged marital communications. In any event, any communications between Elkin and Sheppard were not protected by the spousal privilege because they apparently were never legally married (Tr. 768, 786), see *United States* v. *Lustig*, 555 F.2d 737, 747-748 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978), and in any event had lived apart since the early 1960's, see *United States* v. *Brown*, 605 F.2d 389, 396 (8th Cir.), cert. denied, 444 U.S. 972 (1979).

Petitioners' further contention (Pet. 19) that the government "accosted and attempted to intimidate several" defense witnesses also is baseless. The proceedings at trial reflect that this allegation is based solely on the fact that the prosecutor and an FBI agent had interviewed two defense witnesses prior to their testimony (Tr. 870). No improper conduct of any kind was established; in fact, the only witness whom petitioners asked to voir dire testified that he had spoken with the government representatives "as two

gentlemen would at my house" and was "relaxed" the entire time (Tr. 875-876).[9]

Finally, petitioners' unsupported contentions (Pet. 19) that the prosecutor referred to Elkin's failure to testify and that the trial court showed hostility toward the defense were deemed unworthy of discussion by the court of appeals and do not merit the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

JULY 1984

---

[9]The second defense witness had been met by federal agents upon his arrival from Italy at John F. Kennedy Airport in New York (Tr. 932). Although the witness testified that, as a result of the stop, he feared he would be "returned back to Italy as per sona non grada" [*sic*] (Tr. 933), in the absence of the jury, the prosecutor explained that he had deliberately instructed the agent not to question the witness in the Customs area so that the witness "would not think that his passing through Customs would be contingent on it whatsoever" (Tr. 935).